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buyer on the purchased property to secure the price. Just as the mortgagee may sue for the proceeds and also foreclose his mortgage on the property,²⁵ so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it * * * * Of course, as in the case of a mortgage, the seller should be restricted to satisfaction of his claim with interest * * * * Any excess over the amount due should be returned to the buyer."²⁶

Then why not treat a conditional sale as a chattel mortgage? The technical difficulty that title has never passed to the buyer is easily removed by a simple fiction, which does no more violence to the logic than those of equitable conversion or of lost grants in prescription. By this means justice will be done. The buyer is not prejudiced. He may sell the property subject to the mortgage²⁷ even after default²⁸ or he may redeem by paying the price.

On the other hand the seller is protected. If he recovers on the contract, well and good, for then the property will be the buyer's. If he forecloses, the excess over the mortgage debt with interest will be returned to the buyer and the debt itself satisfied²⁹ and if no return be made an action will lie to compel the mortgagee to account.³⁰

This view is necessarily conclusive as to the question of tender of part payments in replevin. The seller is entitled to his every lawful security. The fact that he has an action on the contract against a probably insolvent buyer would be small consolation to a seller who had been compelled to refund part payments lawfully received under that contract. It is submitted that the view of the principal case is correct.

CAN A TESTATOR'S ESTATE BE HELD LIABLE FOR A LIBEL CONTAINED IN HIS WILL?

In *Harris v. Nashville Trust Company*, decided recently by the Supreme Court of Tennessee, it was held that an action could be

²⁵ See *Toney v. Cook*, 116 Mass., 163; *Erickson v. Rafferty*, 79 Ill., 209.

²⁶ *Williston on Sales*, p. 952, note.

²⁷ *Wilkins v. French*, 20 Me., 111; *Bigelow v. Willson*, 1 Pick., 485; *Russel v. Ely*, 2 Black. (U. S.), 575.

²⁸ *Paulling v. Barron*, 32 Ala., 9.

²⁹ *Colorado Bank v. Wilson*, 16 Colo., 316; *Hoffman v. Wetherell*, 42 Iowa, 89; *Korns v. Shaffer*, 27 Md., 83.

³⁰ *McClendon v. Wells*, 20 S. C., 514; *Reese v. Lyon*, 20 S. C., 17.

maintained against an executor as such for damages from a libel contained in a will and published by its probate. The declaration avers that Mrs. Cleo Woodfin Harris was niece of the testator Woodfin and that the latter with malice and the intention of defaming her character and that of her children, added a codicil to his will containing the following language: "and this sum of \$250.00 to John Woodfin, \$1.00 to William Woodfin, and \$1.00 to Cleo Woodfin, the illegitimate children of my brother, James Woodfin, is all that they are ever to have of my estate." Plaintiff avers that she is the legitimate child of her parents and prays judgment of \$20,000 for the damage resulting to her from the publication of this codicil. Defendant, executor of Woodfin, demurred. The Court treats the proposition as a novel one and cites no authority directly in point; neither have we been able to find a case in which this question has before arisen, but on general principles of law we have reached a result opposite to that of the Court.

"Actio personalis moritur cum persona" is a maxim of the common law—a personal action dies with the person. We agree that this maxim has no application to the present case, for here no right of action ever existed in the lifetime of the testator. An essential element of a libel is the publication—the will locked in the testator's desk or stored in his bank vault was not injurious to the plaintiff's reputation—and no action for damages could lie until publication.¹ The publication complained of is the probate of the will which was required by law,² and which occurred after the testator's death. The tort having arisen or been completed only after the testator's death, it could not have died with him; it is not within the maxim. If Mrs. Harris is to recover, is not the Court confronted with the question—can a dead man commit a tort? Can one without life be guilty of blaspheming another's good name? They answer these questions in the affirmative; is there any sound law with which to substantiate such a conclusion?

The Court held that the executor was the agent of his testator,—“the publication of this libel was made by the agent, the

¹ *Weirs v. Hass*, 6 Ala., 881; *Sheffill v. VanDeusen*, 13 Gray, 304; *Broderick v. James*, 3 Daly, 481; *McGreever v. Kennedy*, 19 Ky. Law Rep., 845.

² *Shannon's Code*, sec. 5665; *Smith v. Harrison*, 2 Heisk, 230; *Douglas v. Baber*, 15 Lea, 651.

executor, in literal pursuance of the authority given; *i. e.*, it was made by the probate of testator's will. It was the duty of course of the executor to probate this will, etc. etc." This ground is untenable for at least two reasons.

In the first place it is abhorrent to the very nature of the executor's legal status. He is a trustee of the estate, an officer of the Probate Court and responsible to it. It is true that the will named him as executor but that amounted to a mere nomination to the Probate Court, which appointed him and from which under the modern English and American decisions he received plenary authority over the estate.³ He holds the legal title to the property himself; he acts for himself as principal and is responsible to the Court on his own account. His duties, rights, and obligations are wholly incompatible with the theory of agency.

Secondly, it is inconceivable that there can be an agency when no principal is in existence; surely the Court can't mean that he was acting for the deceased Woodfin, and yet that is the ground on which they base their decision. It is absurd to say the testator appointed him after the latter's death, so he must have been appointed during the life of Woodfin with the agency to go into effect only upon the death of the testator. This construction is more favorable to the Court than any other, and yet this is clearly erroneous, for death of the principal revokes the agency in every case except two: first, when the agency is coupled with an interest in the subject matter;⁴ and second, when the revocation would involve the agent in liability to third parties.⁵ Certainly the executor's "agency" to probate this will was coupled with no interest in the subject matter, nor would a revocation of the "agency" have rendered him liable to any third parties. His obligation to probate it grew out of no contractual relation with his testator, but it was a duty imposed by law upon the person named as executor.

However, admitting for the sake of argument that the executor is an agent, it does not relieve the situation, for still an executor, whether agent or principal, can only be held for the

³ *Blakely v. Frazier*, 20 S. C., 144; *Stagg v. Green*, 47 Mo., 500; *Tappan v. Tappan*, 30 N. Y., 50.

⁴ *Hunt v. Rousmianiers Admst.*, 8 Wheaton, 174; *Frank v. Roe*, 70 Cal., 296.

⁵ *Goodwin v. Bowden*, 54 Me., 424.

debts owed by the testator at his death.⁶ Also admitting for the same purpose that the tort complained of could be considered a debt, which of course it could not, still the Court's theory is embarrassed because they insist the tort was never committed until after death and probate; and "no action can be sustained against an executor or administrator as such * * * * when the complaint imputes a tort done to the persons or goods of another by testator or intestate."⁷ Thus the executor's liability does not extend to torts of the testator whatever may be the theory of the latter's legal status. This argument of course assumes that the Court would quite readily agree to the proposition that the act of the agent is the act of the principal.⁸

The case is a hard one. Mrs. Harris has been grievously wronged by the testator's false statements, and as a matter of justice she was entitled to redress. It was probably sympathy that led the Court to the conclusion they reached; having found no principle of law able to sustain their position, they created one. It may be best that they did so, but there are some results of such a rule that may well be noted.

Woodfin's will disposed of his property completely, and the will takes effect as of the time of the testator's death.⁹ Thus the legacies of A., B., and C. upon probate of the will vest in them as of the date of the death of the testator, and they are deemed to have been owners between the time of decease and the time of probate. The action for libel rises only upon the probate in this case, so that to allow recovery would result in A., B., and C. paying for the tort of Woodfin. It is true the legacy must be accepted before it takes effect, but the law presumes its acceptance until the contrary is shown, when the devise is beneficial.¹⁰ The testator has passed beyond the jurisdiction of the Court and any liability cast upon his estate that did not exist at his death is not a liability upon the testator nor his property, but a liability imposed upon those whom he has seen fit to favor.

⁶ *Eustace v. Johns*, 38 Cal., 3, p. 23; 2 *Williams on Executors*, pp. 1470-1.

⁷ *Eustace v. Johns*, 38 Cal., 3; 2 *Williams on Executors*, p. 1478.

⁸ 4 *Harvard Law Review*, 347.

⁹ *Wilkinson v. Leland*, 27 U. S., 627; *Groves v. Mitchell*, 90 Wis., 306.

¹⁰ *Merrill v. Emery*, 10 Pick., 507; *Ex parte Fuller*, 2 Story, 327; *Defreeze v. Lake*, 109 Mich., 415; *Perry v. Hale*, 44 N. H., 363; *Rogers v. Farrar*, 6 T. B. Mon. (Ky.), 421.

Another objection to permitting any recovery in this case is that it gives Mrs. Harris a right of action founded upon an act required by law. The statute of Tennessee not only made it the duty of the executor to probate this will, but it provided for criminal prosecution if he failed to do so. It is a universal principle of law that no tort can be predicated upon an act which is required by law for in legal contemplation there can be no wrong if the act complained of is legal;¹¹ and here the very basis of Mrs. Harris' claim was the injury caused by the publication through probate of the will—an act required by statute.¹²

One more result of such a rule as is laid down by the Tennessee Court should be noticed. Suppose a statute of the state made it against public policy for one to devise property to certain classes of persons—for instance to a woman with whom the testator had lived but to whom he was not lawfully married. Unquestionably she could take nothing under his will, even though the testator made her his sole legatee. Now, knowing that he could not bequeath any of his property to this woman, but being desirous that she have a portion of his estate, what would the testator do? He could insert a clause in his will calling her a "thief, liar, imbecile," or impute to her any other characteristic which was false and libellous *per se*. Could she not then take from his estate by means of an action of tort for the libel, and this too in the face of the statute prohibiting her from being a legatee?

We cannot agree with the Court's decision, for we believe it is based on unsound law; neither are we able to find any branch of the law that will support their conclusion. Furthermore, we submit that it is at least a debatable question whether the Legislature should enact a law allowing a recovery for a libel contained in a will. Would not a better remedy for an abuse of this kind be for the Court to suppress the libellous words by striking them from the probate record?

STATUTES UNENFORCEABLE EXTRA-TERRITORIALY BECAUSE PENAL.

It is a general rule of international law that one country or state will not give effect to the penal statutes of another.¹ Courts

¹¹ *Cooley on Torts*, second ed., p. 830.

¹² *Shannon's Code*, sec. 6565.

¹ *The Antelope*, 10 Wheat. (U. S.), 66.